IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DEREK TODD WERDER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13626 Trial Court No. 3VA-17-00059 CI MEMORANDUM OPINION No. 7026 — September 28, 2022

Appeal from the Superior Court, Third Judicial District, Valdez, Patrick J. McKay, Judge.

Appearances: Olena Kalytiak Davis, Attorney at Law, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. RuthAnne Beach, Assistant Attorney General, Office of Criminal Appeals Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge TERRELL.

Derek Todd Werder appeals the superior court's dismissal of his application for post-conviction relief. Werder was convicted of a total of twenty-six counts, including first-degree sexual abuse of a minor, first-degree sexual assault, third-degree assault, and fourth-degree assault, based on physical and sexual abuse he perpetrated

against his stepdaughter and two of his sons.[1] We affirmed his convictions on direct appeal.[2]

Werder then filed an application for post-conviction relief arguing, *inter alia*, that six of his convictions for first-degree sexual assault should be reversed because his trial attorney was ineffective in failing to argue: (1) Alaska's first-degree sexual assault statute is unconstitutionally vague as applied to those convictions; and (2) the jury was not factually unanimous as to a theory of guilt for those convictions.

The six convictions in question were based on six acts of sexual penetration Werder perpetrated against his stepdaughter, K.S., after she turned eighteen. The evidence presented at trial showed that Werder had committed years of physical and sexual abuse against K.S. and other members of his family, including threatening K.S. that he would kill the entire family if K.S. ever tried to leave or if she revealed the abuse. The evidence presented at trial suggested that Werder did not use force or explicitly threaten to use force during these charged incidents and that K.S. even verbally consented during one of the incidents. But the State's theory was that even if K.S. remained silent or verbally consented to having sex, she was still coerced into engaging in sexual penetration based on Werder's long history of extreme physical and sexual abuse.

On appeal, Werder argues that the superior court erred in dismissing his application for post-conviction relief. But he no longer presents his arguments as ineffective assistance of counsel claims; instead, he presents them as free-standing constitutional claims. As the State points out, we have previously suggested that a

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[1] *See Werder v. State*, 2016 WL 3033862, at *1 (Alaska App. May 25, 2016) (unpublished).

[2] *Id.* at *4.

defendant cannot raise a claim of plain error in an appeal from the denial of post-conviction relief.[3]

However, it is unnecessary to decide this case on preservation grounds because Werder's arguments rely on a basic misunderstanding of the law governing first-degree sexual assault, most notably this Court's holding in *Reynolds v. State*.[4]

Alaska's first-degree sexual assault statute provides that a person is guilty of first-degree sexual assault if they "engage[] in sexual penetration with another person without consent of that person."[5] The phrase "without consent" is a term of art defined by statute as meaning that the person "with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping."[6]

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[3] *See, e.g.*, *Jenkins v. State*, 2020 WL 3073852, at *3 (Alaska App. June 10, 2020) (unpublished); *Sherwood v. State*, 2012 WL 1889323, at *5 (Alaska App. May 23, 2012) (unpublished); *Peters v. State*, 2007 WL 2216610, at *2 (Alaska App. Aug. 1, 2007) (unpublished); *see also Burton v. State*, 180 P.3d 964, 975 (Alaska App. 2008) (holding that Burton had failed to preserve a claim raised for the first time on appeal from the dismissal of his application for post-conviction relief, but not directly addressing whether Burton could have raised it as a claim of plain error).

[4] *Reynolds v. State*, 664 P.2d 621, 623-25 (Alaska App. 1983).

[5] AS 11.41.410(a)(1). The legislature recently amended this provision. Under the new version of the statute, a person will commit the crime of first-degree sexual assault if the person "engages in sexual penetration with another person without consent of that person by the use of force or the express or implied threat of force against any person or property." SLA 2022, ch. 44, § 2. At the same time, the legislature also changed the definition of "without consent" to mean that "under the totality of the circumstances surrounding the offense, there was not a freely given, reversible agreement specific to the conduct at issue." *Id.* at § 6. These changes take effect January 1, 2023. *Id.* at § 26.

[6] AS 11.41.470(10)(a).

In *Reynolds v. State*, Reynolds challenged this statute as either unduly strict or unconstitutionally vague. Reynolds argued that "the statute either requires strict liability regarding the putative victim's lack of consent or is so vague that reasonable people will disagree regarding the *mens rea* which the state must prove in order to obtain a conviction."[7]

We rejected this argument. We explained that the victim's "lack of consent" (*i.e.*, the fact that the victim was coerced by use of force or threat of injury) was a surrounding circumstance of the crime.[8] Under AS 11.81.610(b)(2), "if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to . . . a circumstance . . . is 'recklessly.'" Applying this rule, we held that the mental state with respect to the victim's lack of consent was recklessly. In other words, we held that in order to prove first-degree sexual assault, the State must prove "that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent."[9] We further noted that, "[c]onstrued in this way, the statute does not punish harmless conduct and is neither vague nor overbroad."[10]

According to Werder, however, *Reynolds* actually established "two alternative theories of first-degree sexual assault under which to convict a person: either he knowingly obtained consent by force or coercion; or he recklessly disregarded non-consent." The purported existence of these two alternative theories forms the basis of Werder's claims that Alaska's first-degree sexual assault statute is unconstitutionally

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[7] *Reynolds*, 664 P.2d at 623.

[8] *Id.* at 625.

[9] *Id.*

[10] *Id.*

vague and that the jury was not factually unanimous as to a theory of guilt. We reject these arguments because they rely on an incorrect reading of *Reynolds*.

We also note another serious problem with Werder's void-for-vagueness challenge: Werder does not actually identify any ambiguous statutory language. Instead, Werder's core argument on this point appears to be that, under the circumstances of his case, an ordinary person would not have been aware that the victim had been coerced — that is, he argues that the evidence failed to establish that he acted with reckless disregard of the victim's lack of consent. This is not an argument that the language of the statute is unconstitutionally vague; rather, it is an argument that the evidence was insufficient to support Werder's conviction.[11]

We already rejected a very similar argument in Werder's direct appeal. Werder argued the evidence was insufficient to prove that K.S. did not consent (*i.e.*, was coerced by force or threat of injury) given K.S.'s silence or expression of verbal consent and the fact that Werder did not use or explicitly threaten to use force in the time immediately preceding the sexual penetration. We rejected this claim, concluding that the evidence was sufficient to establish that K.S. did not consent in light of Werder's long history of physical and sexual abuse, which included a threat by Werder to kill the entire family if K.S. ever tried to leave or if she revealed the abuse.[12] Those same facts establish that the evidence was sufficient to prove that Werder, who was presumably aware of the coercive environment he created, acted in reckless disregard of K.S.'s lack of consent.

The judgment of the superior court is AFFIRMED.

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[11] *See United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963) (noting that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language").

[12] *Werder v. State*, 2016 WL 3033862, at *3 (Alaska App. May 25, 2016) (unpublished).